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No. 890

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

J. B. KING,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

COURT OF CRIMINAL APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

APRIL 1968

APPEAL IN ERROR FROM THE CRIMINAL COURT OF KNOX COUNTY
HONORABLE JOE D. DUNCAN, JUDGE

J. P. KING,
Plaintiff in Error,
v.
STATE OF TENNESSEE,
Defendant in Error.

Knox Criminal

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Special Prosecutor
Knoxville, Tennessee

B. R. McGee
Special Prosecutor
Knoxville, Tennessee

JUDGMENT AFFIRMED
OPINION BY JUDGE MARK A. WALKER

(Filed September 4, 1968. John A. Parker, Clerk)

Opinion

The defendant below, J. B. King, was convicted in Knox County Criminal Court of assault with intent to commit murder in the second degree and sentenced to one to five years in the penitentiary. His motion for a new trial being overruled, he has appealed to this court, assigning as error that:

(1) He was denied his right to a speedy trial as guaranteed by the state and federal constitutions; and

(2) There is no evidence to support the verdict.

The defendant was arrested at about 10:00 P.M., November 14, 1964, for shooting one Glenn Rose. On March 25, 1966, he was indicted for assault with intent to commit murder in the first degree. His trial was held on March 20 and 21, 1967.

When the case was called for trial on March 20, 1967, the defendant, through his counsel, moved to dismiss the case because he had not had a speedy trial as guaranteed by the state and federal constitutions. This was the first objection to the delay of the defendant's trial. At least one continuance was on the defendant's application.

An accused cannot claim that he has been denied the right to a speedy trial when he acquiesced in or requested the delay. See *Raine* v. *State,* 143 Tenn. 168, 226 S.W. 189; *State ex rel. Underwood* v. *Brown,* 193 Tenn. 113, 244 S.W.2d 168; *Wright* v. *State,* ..... Tenn. ....., 405 S.W.2d 177.

The guaranty of the Sixth Amendment to the United States Constitution is made applicable to the states through the Fourteenth Amendment. *Klopfer* v. *North Carolina*, 386 U.S. 213, 18 L.Ed.2d 1, 87 S.Ct. 988 (1967).

The defendant relies on *Hanrahan* v. *U. S.*, 348 F.2d 363 (1965). In that case, the appellant was convicted five years after he was accused and almost four years after he was first charged with the offense; he made repeated and persistent attempts to obtain a speedy trial; the case was remanded to determine whether or not any of his rights were violated under the federal constitution or the Federal Rules of Criminal Procedure.

In the case before us, the defendant made no objection until the day of the trial. Rose was in the hospital for thirty-one days after the shooting and returned there several times before the indictment. While the indictment was not returned until about sixteen months after his arrest, the defendant requested a continuance and acquiesced in the delay after indictment. 5 Wharton's Criminal Law and Procedure, Sec. 1912.1, (1968 Supplement) says:

> "(I)t is generally held that the defendant is not entitled to a discharge for delay in bringing him to trial unless he resisted postponement, demanded a trial, or made some effort to procure a speedier trial than the state accorded him."

Neither the constitutional inhibition against delay, Article 1, Section 9, Constitution of the State of Tennessee, nor the Sixth Amendment of the United States Constitution was violated under the facts of this case. This assignment is overruled.

Glenn Rose operated a beer tavern on Chapman Highway in Knox County. The defendant and several friends

had been there for beer before and after a football game. On the second occasion, Claude Luttrell, one of the defendant's party, and two patrons were involved in an argument, during which another of defendant's friends (Bob Moore) intervened. Mr. Rose ordered the participants in the argument to leave. The defendant left with his friends, although he was not requested to leave. Moore, Luttrell and the defendant returned in about twenty minutes. They resumed arguing and were again told to leave. They did so after purchasing a package of beer. The defendant and Moore threatened to return as they left.

At about 9:40 P.M. the defendant and his two friends returned. The defendant and Luttrell sat at stools at opposite ends of the bar. Moore remained in the center of the tavern floor. The State's proof shows that Moore had a knife; this is disputed by the defense.

Rose came from behind the counter with a nightstick and struck Moore on the head and held him. The knife fell to the floor and under a record player. The defendant jumped from his stool and shot Rose in the stomach with a .22 caliber pistol which he had bought from Rose that morning. Rose places the distance between them at twenty feet, another witness at ten to fifteen feet and the defendant at six feet.

From the evidence in this case, it was the province of the jury to settle the issue of self-defense. The jury saw and heard the witnesses and passed upon their credibility. The jury decided the issue in favor of the State's theory, and this court cannot say that the evidence preponderates against that finding. *Arterburn* v. *State,* 216 Tenn. 240, 391 S.W.2d 648; *May* v. *State,* ..... Tenn. ....., 420 S.W.2d 647.

The defendant has not carried the burden of showing that the evidence preponderates against the verdict of guilty and in favor of his innocence, which he is required to do on appeal. *McBee* v. *State*, 213 Tenn. 15, 372 S.W.2d 173; *Pryor* v. *State*, 217 Tenn. 695, 400 S.W.2d 700.

It therefore follows that the assignments of error are overruled and the judgment of the trial court is affirmed.

/s/ Mark A. Walker
Presiding Judge

CONCUR:

/s/ W. Wayne Oliver
/s/ Fred D. Gilliam

OFFICE OF CLERK OF COURT OF CRIMINAL APPEALS FOR THE EASTERN DIVISION OF THE STATE OF TENNESSEE

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Opinion of said Court, pronounced at its June term, 1968, in the case of J. B. KING against STATE OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 7th day of January, 1969.

/s/ John A. Parker
Clerk

(Seal)

COURT OF CRIMINAL APPEALS OF TENNESSEE,
AT KNOXVILLE

JUNE TERM 1968

J. B. KING vs. STATE OF TENNESSEE	**No. 4 Knox County** Offense Assault with intent to commit murder in second degree AFFIRMED

Judgment

(Filed September 4, 1968, John A. Parker, Clerk)

Came the plaintiff in error J. B. King by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the plaintiff in error, for his offense of assault with intent to commit murder in second degree be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than five (5) years, and not less than one (1) year, commencing on the day of his reception at said penitentiary.

The sentence of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

The plaintiff in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the plaintiff in error files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $2,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Knox County.

Mark A. Walker
Fred Gilliam
W. Wayne Oliver

OFFICE OF CLERK OF COURT OF CRIMINAL APPEALS FOR THE EASTERN DIVISION OF THE STATE OF TENNESSEE

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Judgment of said Court, pronounced at its June term, 1968, in the case of J. B. KING against STATE

OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 7th day of January, 1969.

/s/ John A. Parker
Clerk

(Seal)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SEPTEMBER TERM 1968

(Filed Oct. 7, 1968. John A. Parker, Clerk)

J. B. King
Vs.
State of Tennessee

Knox Criminal Court

WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Knox County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner J. B. King will pay the costs incident to filing petition for certiorari, for which let execution issue.

Hamilton S. Burnett, C. J.
Ross W. Dyer, J.
Larry Creson, J.
Chester C. Chattin, J.
Allison B. Humphreys, Jr., J.

OFFICE OF CLERK OF SUPREME COURT
FOR THE EASTERN DIVISION OF THE
STATE OF TENNESSEE

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Order of said Court, pronounced at its September term, 1968, in the case of J. B. KING against STATE OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 7th day of January, 1969.

/s/ John A. Parker
Clerk

(Seal)